

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)

Carriage of the Transmissions)
of Digital Television Broadcast Stations)

CS Docket No. 98-120

Amendment to Part 76)
of the Commission's Rules)

REPLY COMMENTS OF

LIFETIME ENTERTAINMENT SERVICES

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SUMMARY

Lifetime strongly opposes the imposition of dual digital/analog must carry during the current broadcast transition period, because such a regime would be unconstitutional, at odds with the statute, and contrary to the public interest.

The *Turner* decision, which barely upheld the existing must carry regime, did not consider and does not support dual digital/analog must carry. The current proceeding, after all, is not about preserving free over-the-air television, but facilitating the conversion to digital technology. This new objective does not warrant the dramatic increase in the must carry requirements now being sought by NAB and other independent broadcasters.

According to NAB, the must carry statute compels the automatic grant of must carry rights to all DTV broadcasts, because they are television "signals." NAB's simplistic analysis wrongly presumes a cavalier Congressional attitude about an issue with enormous implications. Congress failed to include a statutory provision specifically mandating digital must carry, and the canons of statutory construction dictate that this silence should be construed **against** NAB's expansive interpretation. NAB's approach is, in fact, irreconcilable with a variety of provisions of the 1992 statute (*e.g.*, the "substantial duplication" and "duplicate network" exemptions), which reflect Congress' desire to minimize redundant carriage obligations. The only reference to DTV signals appearing in the statute suggests that must carry rights apply only *after* the DTV transition has been completed.

An expansion of the current must carry regime would be particularly inappropriate, because DTV equipment manufacturers stated in their Comments that A/B switches and antennas represent a viable delivery mechanism for DTV. Surely, the "early

adapters" who purchase expensive HDTV sets are unlikely to be deterred by the minor difficulties inherent to using A/B switches and antennas.

NAB calls for the Commission to give broadcasters immediate "certainty" that their HDTV signals can reach cable subscribers, wrongly implying that cable is a digital "gatekeeper." The primary bottleneck for digital television for the foreseeable future is the scarcity of HDTV sets. In any event, digital must carry addresses a potential problem that may or may not occur until 2002, when most DTV broadcasting will begin. Government intervention at this time would be premature and counterproductive.

Finally, NAB asserts that the burden of digital must carry would be small, because cable system upgrades can easily accommodate new DTV signals. But NAB wrongly assumes that cable system upgrades are both inevitable and cost-free. In fact, anticipated upgrades may be abandoned or delayed if new capacity must be squandered on the carriage of redundant, non-revenue producing DTV signals. Capacity set aside for redundant DTV signals would surely come at the expense of more beneficial services, such as new cable programming services, high-speed Internet access, and competitive telephony.

For these reasons, Lifetime urges the Commission to reject the adoption of any digital must carry rules during the transition period.

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**REPLY COMMENTS OF
LIFETIME ENTERTAINMENT SERVICES**

Lifetime Entertainment Services ("Lifetime") hereby files these Reply Comments in the above-referenced proceeding. Lifetime believes that the competition for cable carriage should be played on a "level playing field." Its initial Comments explain why the Company strongly opposes the imposition of dual digital/analog must carry during the current broadcast transition period. Significantly, the "pro-must carry" broadcasters participating in this proceeding have so far failed to answer any of the very serious constitutional, statutory, and public policy questions raised by their latest carriage demands. They invariably emphasize that guaranteed cable carriage is critical to the introduction of HDTV and the transition to a digital-only environment. They fail to explain, however, the basis for this factual assumption. They also fail to reconcile the dramatic extension of must carry that they now seek with the limited purpose for which must carry was initially adopted and applied.

Although the National Association of Broadcasters ("NAB") and a host of independent broadcasters suggest otherwise, the requested extension of must carry does **not**

automatically follow from the initial statutory grant. The extension would, in fact, be inconsistent with the precarious constitutional justification applicable to the existing must carry regime.

As Chairman Kennard recently noted:

[*Turner*] was not an easy fight Now, if the broadcast industry comes to the agency and says: "We want not one, but two, channels on the basic cable tier," my sensibilities as a lawyer tell me, "Well, you've got to make the case for that." And that is going to be fairly difficult burden. If you're telling cable systems, including those that are capacity constrained, to give two six megahertz channels to every local broadcast signal, I have difficulty understanding how we can make that case in the Supreme Court. . . . ¹

The Commission must remember that the issue in this proceeding is **not** whether the existing analog must carry requirements ultimately can be replaced with digital must carry requirements. The question here is whether the Commission should impose both requirements simultaneously. Were it to do so, the resulting burden on cable operators, cable programmers, and cable customers would increase dramatically. The careful "balance" that Congress sought to achieve, which the Supreme Court upheld by the narrowest of margins, would be cast badly askew.

I. DUAL DIGITAL/ANALOG MUST CARRY WOULD BE UNCONSTITUTIONAL

The Comments submitted by digital must carry proponents reflect a fatal tension between their current objectives and legal justifications and the very different objectives and justifications underlying the existing version of must carry. While they insist

¹ *Steady as She Goes -- FCC Chairman Bill Kennard and the Cool Approach to DTV, Broadcasting and Cable*, Nov. 26, 1998, S10.

that their expansive request was already anticipated by Congress and encompassed by the existing must carry regime, their own advocacy and the factual record reveal the exact opposite to be true. The Supreme Court's constitutional review never considered and does not support dual digital/analog must carry.²

The Executive Summary of NAB's Comments succinctly conveys the key constitutional flaws inherent to the requested must carry expansion. It begins, "[i]n 1992 Congress passed the cable television must carry law specifically to preserve this country's free, local television system and its multiplicity of programming sources."³ Lifetime does not dispute that this statement accurately characterizes the legal basis for the Supreme Court upholding the existing must carry regime.⁴ What Lifetime cannot understand is NAB's assumption that the current proceeding and Congress' 1992 objectives are somehow inextricably linked.

Despite NAB's claims, this proceeding is not about the preservation of the country's local television system. Must carry is already assured. With few limitations, each broadcaster is now legally guaranteed access to one channel on all of the cable systems in its

² Perhaps recognizing the substantive weakness in their position, NAB places peculiar emphasis on the fact that its constitutional argument is advanced by Jenner & Block, the very same law firm that represented NAB in its (barely) successful defense of the initial must carry regime before the Supreme Court. NAB Comments at 5. Jenner & Block's views are, of course, entitled to no special weight. The firm's role in earlier must carry litigation does not endow it with a unique understanding or impartiality. To the contrary, the firm has been retained and paid by NAB to advocate NAB's position.

³ NAB Comments at i.

⁴ See, *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622; 114 S. Ct. 2445 (1994) ("*Turner I*"), and *Turner Broadcasting System, Inc. v. FCC*, 580 U.S. 180; 117 S. Ct. 1174 (1997) ("*Turner II*").

local market. The nation's broadcasters can continue to rely on this guaranteed cable carriage for their analog signals until the change to digital is completed, at which time guaranteed cable carriage will convert to their digital signals.⁵ The maintenance of "regular" television broadcasting service, the stated constitutional justification upheld in *Turner II*,⁶ simply is not in jeopardy.

As NAB itself proclaims, the objective of dual digital/analog must carry during the transition period would be simply to facilitate the conversion to a digital-only universe.⁷ It contends that broadcasters are more likely to quickly begin broadcasting in both technologies if both transmissions are guaranteed cable carriage. There may be potential technical and spectrum-management benefits to be secured by a rapid conversion to digital technology,⁸ but those benefits have never been identified by Congress nor the Supreme Court as a constitutional justification for must carry and its concomitant First Amendment burdens. Facilitating the conversion to digital technology simply is not legally and factually equivalent to preserving the existing system of free, over-the-air television.

NAB's notion that dual digital/analog must carry would somehow promote a "multiplicity of programming sources," is even more peculiar. By definition, dual must carry

⁵ See 47 U.S.C. §534(b)(4)(B).

⁶ See *Turner II*, 117 S. Ct. 1174 at 1189.

⁷ NAB Comments at ii.

⁸ In fact, it is unclear whether the intended beneficiaries of the original must carry scheme (*i.e.*, television viewers unwilling or unable to subscribe to cable) will be well served by the conversion to digital technology. As the participation of electronic manufacturers in this proceeding makes clear, the conversion will require these viewers to expend considerable sums to upgrade their television sets to continue receiving broadcast transmissions.

would reduce the number of programming sources available over cable, as each local broadcaster suddenly would find itself with two, rather than one, cable channels. The approach is particularly troubling because broadcasters always have the option of reaching television households through "over-the-air" transmissions from their licensed facilities, whereas displaced cable programmers (like Lifetime) have no such option available. None of the Comments submitted in this proceeding advance a credible explanation as to how a "double dose" of must carry would promote a "multiplicity of programming sources." A variety of cable programmers (including Lifetime) did experience channel deletions and launch delays as a result of analog must carry, and additional deletions and delays would surely accompany the supplementary imposition of digital must carry.

NAB's Executive Summary goes on to argue that the Supreme Court upheld must carry in *Turner*, in large part, because it concluded that the resulting carriage displacement would be "de minimus."⁹ This conclusion was, of course, based solely on a review of analog must carry. It is ironic that NAB would advance this point, as it emphasizes that the Supreme Court never contemplated a dual digital/analog must carry regime. The factual record before the Court indisputably addressed the implications of an analog-only regime, and there was absolutely no consideration given to the implications of a dual digital/analog regime. Try as it might, NAB cannot have it both ways. Either the Supreme Court was misled in focusing on an analog-only regime, or the Commission is now being

⁹ NAB Comments at i.

misled in being told that it was always understood that must carry would encompass overlapping digital and analog broadcasts.¹⁰

Interestingly, NAB's Executive Summary ultimately emphasizes that the "key to success for [the digital] transition . . . and certainly to its length, is consumers' buying DTV sets quickly and in large numbers."¹¹ Again, Lifetime does not dispute NAB's statement.¹² It disagrees, however, with NAB's subsequent suggestion that dual digital/analog must carry should be imposed because it would necessarily ameliorate this problem by accelerating the purchase of DTV sets. NAB offers no factual support for its position. The suggestion reveals NAB's outdated view of the video marketplace.

There is no reason to believe that broadcasters will be the only providers of HDTV. Several cable programmers already have announced plans for HDTV, and Lifetime assumes that others will follow. As Lifetime explained in its Comments, forcing the nation's cable systems to carry HDTV signals of broadcasters actually may impede the availability of HDTV programming to consumers, because the channel capacity consumed by such carriage would then become unavailable for the HDTV signals of cable programmers. This would be particularly unfortunate, because broadcasters already have a means of delivering HDTV

¹⁰ NAB's introduction of a new analysis, by Strategic Policy Research, suggesting that expanding must carry to simultaneously encompass digital and analog signals would have only a modest impact on cable carriage, does not change the fact that the issue was missing from the Supreme Court's review. In any event, the analysis has numerous flaws (*e.g.*, excluding 20% of cable systems that did not report unused capacity and assuming that all small systems can absorb the costs necessary to activate their potential capacity) and is highly speculative as to future upgrade capabilities.

¹¹ NAB Comments at ii.

¹² Lifetime's own Comments emphasize that the availability of HDTV sets is the greatest potential "bottleneck" to the digital conversion.

programming to consumers through over-the-air transmissions. The most efficient means for maximizing the quantity of HDTV programming delivered to the nation's television households would be to have HDTV cable programmers rely primarily on cable systems for distribution and have HDTV broadcasters rely primarily on their over-the-air transmissions. The redundant delivery mechanism sought by certain broadcasters might actually retard, rather than accelerate, the availability of HDTV programming and the demand for HDTV sets.

**II. THE STATUTE DOES NOT REQUIRE, OR EVEN PERMIT,
DUAL DIGITAL/ ANALOG MUST CARRY**

**A. Additional Must Carry Burdens Should Not Be Imposed
Cavalierly On The Cable Industry**

According to NAB, the Commission must immediately confer must carry rights upon each DTV signal as it comes on the air. The position is premised on the notion that digital broadcasts are "signals" and, therefore, automatically entitled to mandatory carriage. NAB maintains that if Congress had intended to exclude DTV signals from must carry during the current transition period, it would have done so expressly and unequivocally.¹³ This simplistic analysis wrongly presumes a cavalier attitude on the part of Congress towards the must carry burden that is irreconcilable with the cautious approach Congress actually pursued.

Given the gravity and enormous implications of this issue — which would extend must carry rights to thousands of broadcast signals — it is telling that Congress failed to include a statutory provision specifically mandating digital must carry during the transition period. Common sense dictates that Congress' silence on this issue must be construed **against** dramatically expanding must carry obligations. It is inconceivable that Congress would have

¹³ See NAB Comments at 3.

intended to double the must carry burden imposed on the cable industry without doing so explicitly. Surely Congress would be troubled by a regime that would require the deletion of popular cable programming services in favor of HDTV broadcasts that are available a small part of the day to a very small number of households financially able to acquire expensive HDTV sets.

In fact, as Lifetime explained in its Comments, the Commission has no statutory authority to impose digital must carry during the transition period. Section 624(f) of the Communications Act prohibits the Commission from enacting any new carriage requirements, including digital must carry, during the transition period absent express authority from Congress.¹⁴ The one (and only) reference to digital broadcast signals appearing in the 1992 Cable Act, Section 624(b)(4)(B), merely directs the Commission to initiate a proceeding to establish "any changes in the signal carriage requirements" of cable systems to ensure carriage of broadcast signals "which have been changed to conform" with the new DTV standards.¹⁵ This singular reference to possible must carry rights for DTV signals strongly suggests that must carry rights for digital signals should apply only **after** the transition to digital has been completed. NAB's analysis ignores the plain text of the analog must carry statute. Broadcasters are not entitled under the law to mandatory carriage of **both** their analog and new digital signals.

When all is said and done, NAB's suggestion that the "Commission . . . may fashion exceptions for small cable systems that have not upgraded their capacity or

¹⁴ 47 U.S.C. § 544(f)(1).

¹⁵ 47 U.S.C. § 534(b)(4)(B).

facilities,"¹⁶ belies its assertion that digital and analog signals are indistinguishable for purposes of the must carry statute. NAB is well aware that the must carry statute already includes a statutory cap on must carry obligations based on channel capacity (*i.e.*, "one third") and that the Commission would lack any legal basis to impose an additional regulatory cap for signals otherwise entitled to must carry. While NAB's willingness to compromise is politically commendable, it is legally suspect. It is a stunning admission that a dual digital/analog must carry regime was not contemplated by Congress in fashioning the must carry statute.

B. Other Statutory Provisions Demonstrate That Congress Did Not Intend To Confer Dual Digital/Analog Must Carry Rights Under The 1992 Cable Act

NAB's expansive statutory position is even more tenuous in light of other provisions of the 1992 must carry statute, which reveal an obvious Congressional interest in limiting the must carry burden, and do so in a manner that is inconsistent with the simultaneous operation of digital and analog must carry. These provisions clearly reflect a Congressional desire to minimize the burdens associated with must carry where its use would not directly enhance content diversity.

Section 614(b)(5), for example, provides that a "cable operator shall not be required to carry the signal of any local television station that *substantially duplicates* the signal of another local commercial television station."¹⁷ This provision reflects an obvious intent to avoid redundant must carry obligations and is wholly at odds with the dual

¹⁶ NAB Comments at iii.

¹⁷ 47 U.S.C. § 534(b)(5) (emphasis added).

imposition of digital and analog must carry sought by NAB. Section 614(b)(5) also provides that no cable operator shall be required to "carry the signals of more than one local commercial station affiliated with a particular broadcast network."¹⁸ This exemption for "duplicate networks" directly contradicts NAB's assertion that Congress intended dual analog and digital must carry rights under the 1992 Cable Act.

NAB does its best to distinguish these must carry exemptions, and it argues valiantly that they do not apply to digital and analog signals broadcast from the same licensee. The tortured analysis is singularly unpersuasive, however, as it comports neither with the letter nor the spirit of these must carry exemptions. The notion that Congress imposed an automatic extension of the must carry regime to encompass both digital and analog carriage during the current transition period, without bothering to set any operational parameters on this dual carriage obligation, is utterly implausible. It cannot be reconciled with the rest of the must carry statute, which provides careful definitions and generally minimizes the mandatory carriage of redundant signals.

III. BROADCASTERS HAVE A VIABLE OPTION FOR DELIVERY OF DTV SIGNALS TO CONSUMERS: ANTENNAS AND A/B SWITCHES

Lifetime emphasized in its Comments that digital must carry is unnecessary because consumer use of a remote control A/B switch and off-air antenna will not pose a significant practical problem in the digital era.¹⁹ By contrast, NAB's Comments say very little about the viability of an A/B switch and off-air antenna as an option for the reception of

¹⁸ 47 U.S.C. § 534(b)(5).

¹⁹ Lifetime Comments at 11-12.

DTV broadcasts. In the face of overwhelmingly contrary evidence, NAB inexplicably asserts that the Commission is somehow "bound" by a Congressional "finding" from 1992, which was based on studies that are now more than 12 years old.²⁰

The Commission, of course, is under no obligation to cast a blind eye towards the record in this proceeding and the dramatic technological developments in A/B switch and antenna technology. Indeed, Comments submitted by several consumer electronics manufacturers confirm that off-air reception will be a viable delivery mechanism for digital broadcast signals:

- Philips Electronics, a leading manufacturer of digital television equipment, explains that it is "confident that its DTV receivers will be uniformly capable of receiving and displaying off-air DTV signals with little or no difficulty or confusion being imposed upon the consumer."²¹ Philips also confirms the Commission's conclusion (at ¶ 88 of the NPRM) that digital television sets will incorporate A/B switches that operate by remote control.²²
- DTV equipment manufacturer Thomson Consumer Electronics states that it is "confident that its DTV receivers will be uniformly capable of receiving and displaying off-air DTV signals" and that A/B switches will be a "standard feature in all of Thomson's DTV receivers, usually located on the receiver's remote control unit."²³

²⁰ NAB Comments at 11. NAB further contends that "history has shown . . . that consumers with cable will only use cable for viewing over-the-air broadcasters." *Id.* History has also shown, however, that "early adapters," who everyone agrees will be the first purchasers of HDTV sets, are not easily deterred, as NAB assumes. The reality is that early purchasers of digital television sets will be spending thousands of dollars for the express purpose of receiving HDTV telecasts, and obviously will aggressively seek out whatever HDTV programming is available, whether or not it is available via cable.

²¹ Philips Comments at 14-15.

²² Philips Comments at 19.

²³ Thomson Comments at 23-24.

- Consumer Electronics Manufacturers Association ("CEMA") states that it, too, is "confident that DTV receivers will be capable of receiving and displaying off-the-air signals with excellent picture quality."²⁴

Those "early adapters" willing to spend many thousands of dollars on expensive HDTV sets surely will not be deterred by the minor difficulties inherent to the deployment of an A/B switch and antenna. DirecTV, the nation's largest DBS provider, has repeatedly stated that it does not intend to offer local broadcast signals in its satellite transmission-delivered programming package and will instead rely on an A/B switch for DirecTV customers to gain access to local broadcast signals. DirecTV's reliance on A/B switches will continue with the introduction of HDTV.²⁵ Similarly, cable MSO TCI has announced a program to assist cable subscribers who purchase HDTV sets to optimize reception of digital broadcasts using off-air antennas.²⁶

Lifetime urges the Commission to take full account of the overwhelming evidence in the record in this proceeding about the advancements that have occurred in A/B switch and off-air antenna technology, and the motivations and capabilities of HDTV set owners, which together provide dispositive reasons why digital must carry rules are both unnecessary and unconstitutional.

²⁴ CEMA Comments at 26.

²⁵ See, e.g., *Broadcasting & Cable*, Nov. 23, 1998, p. 46 (quoting a DirecTV representative, who stated that "DTV broadcasts, received on a companion over-the-air antenna to a DBS dish, will allow local stations to 'reconnect directly with their audience minus the cable gatekeeper.'").

²⁶ *No "Bottleneck": TCI Says Antennas Are Answers for Customers' DTV*, *Communications Daily*, Dec. 10, 1998, p. 3. Under the program, a special team of technicians will provide free service calls and will assist customers in receiving the best DTV signal by tuning the antenna and by providing the subscriber with a free A/B switch if needed. *Id.*

IV. DUAL DIGITAL AND ANALOG MUST CARRY WOULD BE ADVERSE TO THE PUBLIC INTEREST

A. Digital Must Carry Is Not "Essential" To The Digital Transition

NAB repeatedly calls for the Commission to give broadcasters "certainty" that their HDTV signals can reach cable subscribers — threatening that broadcasters otherwise may be reluctant to meet the Commission's digital build-out schedule.²⁷ While NAB would like the Commission to believe that the very future of digital television is entirely contingent upon broadcasters being granted automatic dual must carry rights, NAB's argument is pure hyperbole and at odds with its own acknowledgement that the real "bottleneck" for digital television is the scarcity of HDTV sets.

For the foreseeable future, the limited availability²⁸ and high cost²⁹ of digital television sets will, in fact, be the primary factor restraining consumers' reception of DTV signals — not carriage on cable. Joint Comments submitted by various public interest groups, including the Office of Communication of the United Church of Christ, Media Access Project, and others ("UCC Comments") echo this point, stating: "Nor is there any great need for must carry in the near term to ensure that members of the public receive digital signals. By all accounts, digital receiver penetration is expected to be very slow in the first few years of the

²⁷ See NAB Comments at 12-14.

²⁸ For example, CEMA predicts that only 150,000 DTV sets will be sold by the end of 1999, or a penetration rate of only 0.15% of the 98 million U.S. television households. Jim Cooper and Megan Larson, *Digital TV: A High-Def Breakthrough*, Mediaweek, Dec. 14, 1998.

²⁹ A study released in early December by Forrester Research confirmed that the current cost of DTV sets, between \$5,000 and \$10,000, is simply too high for consumers. *Id.*

transition."³⁰ Digital must carry will do little to reduce or eliminate this problem, and would likely exacerbate it.³¹ Moreover, as discussed in Section III above, with the ability of consumers to receive digital broadcasts via off-air antennas, cable carriage is but one small piece of the DTV transition puzzle. The reality is that digital must carry is anything but "essential" to the transition to digital television — cable systems are not digital "gatekeepers."

**B. Immediate Imposition Of Digital Must Carry
Would Be Premature And Counterproductive**

NAB argues that immediate must carry rules are necessary, and that these rules should mandate carriage "*as each DTV signal goes on air.*"³² Despite NAB's protestations, there can be little doubt that Commission action would be grossly premature at this time. The DTV transition schedule starts with the largest networks in the largest markets.³³ The vast majority of commercial stations (*i.e.*, all but approximately 120) have until May 1, 2002 to construct DTV facilities, and non-commercial stations need not commence DTV broadcasts

³⁰ UCC Comments at 4. UCC, *et al.* also cited studies estimating that fewer than 25% of households will have digital receivers by 2004. *Id.*

³¹ As Lifetime explained in its Comments, the imposition of digital must carry during the transition period would likely inhibit the development of HDTV for cable networks, and thereby reduce consumers' incentives to purchase HDTV sets.

³² NAB Comments at 18 (emphasis in original); NAB Comments at 52 (NAB "urges the Commission to adopt as soon as possible must carry rules to ensure full and immediate cable carriage of DTV signals as they come on air during the DTV transition.")

³³ Only network affiliates of the four largest broadcast networks in the top-ten market must commence DTV broadcasting by May 1, 1999, while "big-four" network affiliates in the top thirty markets must begin DTV broadcasting by November 1, 1999. *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Fifth Report and Order, 12 FCC Rcd. 12809, 12840-41 (1997).

until May 1, 2003.³⁴ As such, there is no justification for immediate action by the Commission. In their joint Comments, public interest groups, UCC, Media Action Project and others noted:

[T]he Commission's mandate is to promote the public interest, not private interests. . . . Commission action on the basis of what is known today would be grossly premature. There are too many unsettled technological, economic and legal issues for the Commission to make a reasoned decision. Moreover, it is apparent that must carry rules are unnecessary before May 1, 2002. The Commission should therefore defer its determination of this matter until some of these issues are settled.³⁵

Lifetime, as a cable programmer with a well-established analog service and a fledgling digital service could not agree more. The video marketplace will develop best if it is free from intrusive government favoritism.

Cable operators have strong economic incentives to deliver digital programming in response to consumer demand. Recent history suggests that the first digital broadcast stations *will* succeed in obtaining carriage on cable systems through private negotiations. Carriage agreements that provide for carriage of DTV broadcasts are now being negotiated, and in some cases finalized, between cable operators and broadcasters.³⁶

³⁴ *Id.* at 12832.

³⁵ UCC Comments at 3-4.

³⁶ In mid-December, Time Warner and CBS reached an agreement whereby Time Warner agreed to carry the digital signals of CBS's fourteen owned-and-operated TV stations. The agreement also provides a framework by which Time Warner systems will carry the digital signals of CBS affiliates if the affiliates so desire. *See* Donna Petrozzello and Glen Dickson, *TW to CBS: Will Carry*, *Broadcasting & Cable*, Dec. 14, 1998, p. 6. The Time Warner-CBS agreement comes on top of reports from MediaOne that about half of its retransmission agreements already include digital carriage specifications. *CableFax Daily*, Oct. 7, 1998, p. 1.

As for smaller market and independent broadcasters, NAB appears to assume that Congress and the Commission want as many stations as possible to be broadcasting in DTV as quickly as possible. But there is no indication that Congress or the Commission desires a *more aggressive* DTV transition schedule, as NAB seems to suggest. By the time that smaller market and other broadcasters must begin digital broadcasting (*i.e.*, in 2002), many, if not most, of the major questions about the DTV transition will have been answered and the business risks of the transition will have been substantially reduced.³⁷

C. Digital Must Carry Would Impose A Substantial Burden On Cable Systems And Cable Programmers

NAB argues that the burden of digital must carry would be "small (if not *de minimus*)," based, apparently, on a study conducted by its consultants, Strategic Policy Research, Inc., which concluded that cable system upgrades will "easily" accommodate new DTV signals as they begin broadcasting.³⁸ Yet, NAB asks the Commission to allocate *thousands* of cable channels, which have not yet been created by cable operators, to DTV broadcast signals, while apparently assuming that cable system upgrades are both inevitable and cost-free to cable operators. NAB's position completely ignores the adverse incentives that a digital must carry regime would create for cable system upgrades. The Commission should not assume, as NAB apparently has, that cable system upgrades will eliminate the

³⁷ In any event, if digital broadcasting is truly as risky a proposition as NAB suggests, then it may be prudent for small stations to allow the larger broadcasters to lead the way and assume the most significant risks, as contemplated by the Commission's transition schedule. It would be imprudent for the Commission to give artificial incentives to small market broadcasters to begin digital broadcasting ahead of the transition schedule by granting them immediate digital must carry rights.

³⁸ NAB Comments at 24-26.

serious problem of a lack of available cable channel capacity. Anticipated upgrades may never be built, or may be significantly delayed, if new capacity would be squandered on redundant digital broadcasts, from which cable operators would derive no incremental revenue.

NAB's position is also fundamentally unfair to cable networks, in general, and recently launched or future cable networks, in particular. Lifetime and other cable programmers now actively compete for channel space, even on upgraded plant. Dual digital must carry rules might adversely impact the launch and survival new programming networks, not to mention the development of non-video services (*e.g.*, competitive telephony and high-speed Internet access service). As a provider of both an established analog network, Lifetime Television, and a newly-launched digital network, Lifetime Movie Network, Lifetime urges the Commission to consider the interests of recently-launched cable networks — and the terribly adverse consequences that dual must carry would pose. The Commission should not be misled by NAB's assurance that there is ample channel capacity available for all would-be users. The assurance does not comport with Lifetime's own experience and is belied by NAB's insistence that digital must carry is necessary to secure cable carriage. If NAB is truly confident that sufficient channel capacity is available, it should be willing to compete for it on a "level playing field" with unaffiliated cable programmers (like Lifetime).

CONCLUSION

For the reasons set forth in its Comments and for the additional reasons discussed herein, Lifetime urges the Commission to reject the adoption of any digital must carry rules during the transition period. The imposition of a dual digital/analog must carry regime would be unconstitutional, at odds with the must carry statute, and contrary to the public interest.

Respectfully submitted,

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